No.

79-1218

Supreme Court, U. S.
FILED
FEB 4 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

GEORGE JOHN McCARTY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

L. Anthony Weisensee
108 North Phillips
Sioux Falls, South Dakota
57102
Counsel for Petitioner

Steve Jorgensen
Law Center, Suite 100
505 West Ninth Street
Sioux Falls, South Dakota
57104
Counsel for Petitioner

JW

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George John McCarty, Jr. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App.A, infra) is unreported.

JURISDICTION

The judgment of the Court of Appeals (App.A, Infra) was entered on January 3, 1980. This petition for certiorari was filed less than thirty days from the date aforesaid. The jurisdiction of this Court is invoked under U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Whether or not an agreement to conspire between the Petitioner and witness Gramberg inasmuch as witness Gramberg was only feigning an agreement to further his own escape from authorities.

II. Whether or not alleged overt act number one as contained in the indictment is an overt act in furtherance of a conspiracy and therefore properly submitted for consideration by the jury.

III. Whether or not Trial Court erred in denying Petitioner's motion to withdraw alleged overt acts number three, four and six from consideration by the jury.

IV. Whether or not there existed sufficient evidence to prove the obstruction of justice charge.

STATUTES INVOLVED

18 U.S.C. §371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. §1503 provides in pertinent part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any Court of the United States***in the discharge of his duty***or corruptly or by threats or force***influences, obstructs, or impedes, or endeavors to influece, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was convicted of charges of conspiracy in violation of 18 U.S.C §371 and obstruction of justice in violation of 18 U.S.C. §1503. The Government alleged that the Petitioner conspired with a one Daniel Gramberg, and that the nature of the conspiracy was that Petitioner was to get Gramberg released from jail so that Gramberg could murder a witness that was to testify against Petitioner in other criminal proceedings for which Petitioner was to

stand trial. The conspiracy was allegedly formed by a meeting of the Petitioner and Gramberg at the Minnehaha County South Dakota Jail. The Government alleged six separate overt acts which were claimed to constitute elements necessary to constitute conspiracy. The alleged object of the conspiracy was never completed. Said Daniel Gramberg maintained that he was merely feigning agreement with the Petitioner.

The Government's evidence in this case rested largely upon the testimony of the alleged co-conspirator, Daniel Gramberg. Gramberg testified that he and the Defendant were inmates in the same cell block in the Minnehaha County Jail in Sioux Falls, South Dakota, in September of 1977, and that during the period they were incarcerated together they had several conversations (TR84). Gramberg further testified that the Defendant discussed charges that were pending against him and possible witnesses that may appear to testify against him pertaining to said charges (TR85).

Gramberg further testified that he and the Defendant discussed having the witness murdered and the various methods of accomplishing that goal (TR86). After these discussions Gramberg was transferred from the Minnehaha County Jail to the Veteran's Administration Hospital, the evidence shows that on two occasions the Defendant visited Gramberg at the Veteran's Administration Hospital (TR93). Gramberg testified that he and the Defendant made arrangements wherein the Defendant would provide Gramberg with an automobile so that Gramberg could

leave the Veteran's Administration Hospital and meet the Defendant in Phoenix, Arizona (TR94). Gramberg testified that the reason for going to Phoenix, Arizona, to meet the Defendant was to finalize plans for the proposed murder of the witness (TR95).

Gramberg testified that the Defendant provided him with $300 for travel money to Phoenix, Arizona, and in addition had supplied him with small sums of money for cigarettes on prior occasions (TR96).

Gramberg testified that on October 21, 1977, Defendant left a rental automobile at the Veterans's Administration Hospital, and that on October 23, 1977, he left the Veteran's Administration Hospital in Sioux Falls and traveled to Sioux City, Iowa (TR98).

Gramberg testified that he never did in fact go to Phoenix, Arizona, or do anything towards the killing of a witness, and that in fact he had never met face to face with the witness (TR 99,100).

Gramberg testified that he was arrested a year later in Ellensburg, Washington, by FBI agents (TR100).

On cross-examination Gramberg admitted that the final plan to do away with the witness was to be made in Phoenix, Arizona, and the purpose for going to Phoenix, Arizona, was to finalize his arrangements with the Defendant (TR104).

Additionally, Gramberg testified he did not even know the name of the

intended victim (TR105).

Gramberg testified that he never intended to go to Phoenix, Arizona, or to enter into a conspiracy with the Defendant (TR105).

He testified that he never looked for the person who was supposed to be killed, nor did he purchase a weapon to accomplish that goal (TR117).

Gramberg states that the only reason he went along with the Defendant was so he could get some money and get out of jail (TR121).

FBI Special Agent Payne testified that Gramberg repeatedly told the FBI that he never had any intentions of harming anybody for the Defendant (TR 236).

The Defendant took the witness stand and testified on his own behalf and testified that he never asked Daniel Gramberg to harm any person or to contact any person and denied any involvement in any conspiracy (TR265). Additional witnesses were called whose testimony tended either to corroborate the Government's version or the Defendant's version.

The case was submitted to the jury over Defendant's motion for judgment of acquittal and the jury returned a verdict of guilty on both charges.

REASONS FOR GRANTING THE WRIT

I.

Petitioner contends that there was insufficient evidence on which to find that an agreement existed between the Petitioner and one Daniel Gramberg, the Government's witness in this case.

The law is clear that in order to establish a conspiracy it must be proven beyond a reasonable doubt that two or more persons agreed and intended to carry out a plan to commit a crime. United States v. Kissel 218 U.S.601, 31 S.C.124 (1910). See also 1 Wharton Criminal Law and Procedure, pages 183, 184.

The Government has failed to show that this essential requirement was satisfied. Rather what the evidence shows is that Gramberg in order to further his own escape from jail feigned an agreement with Petitioner.

On other occasions this Court has held that a conspiracy is an agreement among conspirators and a meeting of the minds is required. Unless at least two people commit the act of agreeing, no one does. U.S. v. Falcone, 311 U.S. 205 (1940). Krulewitch v. U.S., 336 U.S. 440 (1949). U.S. v. Rosenblatt, 554 F2d 36 (1977).

Failure to establish that a bona fide agreement existed between Petitioner and Daniel Gramberg, the Government's charge of conspiracy must fail. United States v. Skillman, 442 F2d 542, 547 (8th Cir.), cert. denied, 404 U.S. 833 (1971).

In the present case using the evidence in light most favorable to the

Government, it is clear that no agreement existed which would form the basis of a conspiracy. The Government's case rested mainly on the testimony of Daniel Gramberg, the alleged co-conspirator. Gramberg testified that he and the Defendant made arrangements wherein the Defendant would provide Gramberg with an automobile so that he could leave the Veteran's Administration Hospital in Sioux Falls, South Dakota, where he had been transferred from jail for medical reasons, and later meet Defendant in Phoenix, Arizona (TR94). Gramberg testified that the reason he was going to go to Phoenix, Arizona, was to meet with the Defendant and finalize plans for the proposed murder of a witness who was to testify in other criminal proceedings against the Defendant.

The testimony is undisputed that witness Gramberg never did in fact go to Phoenix, Arizona, and he admitted on cross-examination that the agreement to do away with the witness was to be consummated in Phoenix, Arizona, and the purposes for going to Phoenix was to enter into an agreement and make arrangements with the Defendant. Gramberg also testified that he did not even know the name of the intended victim (TR105).

Petitioner respectfully asserts that no agreement was ever consummated between Petitioner and Gramberg, and that Gramberg merely feigned his participation in the alleged conspiracy in order to further his own escape from the authorities. The Court in U.S. v.

Rosenblatt, 554 F.2d 36 (1977) held that:

> "When one of two persons merely pretends to agree, the other party, whatever he may believe, is in fact not conspiring with anyone."

Thus, in the present case, even though Gramberg may have appeared to have been a conspirator, he in fact was not, inasmuch as he never intended to enter into a conspiracy and therefore, a conspiracy could not have existed.

II.

Alleged Overt Act Number One as contained in the Indictment and that the jury was instructed on reads as follows:

> "On or about September, 1977, Daniel Gramberg and George McCarty, Jr. met with one another in the Minnehaha County Jail, and George McCarty offered his assistance in getting Daniel Gramberg out of jail so that Gramberg could kill Jon Moeller for George McCarty."

The Government urges that alleged overt act number one was an act in furtherance of the alleged conspiracy. Petitioner here contends that the most that can be said for alleged overt act number one is that it is the basis for an agreement and therefore it was erroneous for it to be submitted to the jury.

The law as stated in the First Circuit in 1971 in the case of U.S. v. Sarno, 456 F2d 875 (1971) would seem to be in conflict with the holding of the 8th Circuit Court of Appeals in the present case.

In Sarno the Court agreed with the Defendant's argument that the agreement by which the parties entered into the conspiracy could not be considered an overt act. In that case, the First Circuit Court of Appeals upheld the conviction and stated that:

> "No objection was raised to the submission of the overt act to the jury or to the instructions of overt acts generally."

The Court went on to state that had an objection been made the Court could have withdrawn that particular overt act from consideration by the jury. See also Herman v. U.S., 289 F2d 362.

In the present case a specific motion was made to have alleged overt act number one withdrawn from consideration by the jury but such motion was denied.

Petitioner respectfully contends it was error on the part of the Trial Court to submit overt act number one to the jury for their consideration, and said error was prejudicial to the Defendant.

III.

Petitioner also contends that there was insufficient evidence to submit to the jury alleged overt acts three four and six, and that the Court erred in refusing Defendant's Motion to withdraw said alleged overt acts from the consideration of the jury.

Alleged overt acts three, four and six were contained in the Indictment and submitted to the jury in the following form:

3. "On or about October 9, 1977, Daniel Gramberg called James McCarty in Inwood, Iowa, for the purpose of having James McCarty contact George McCarty to visit Gramberg."

4. "On or about October 20, 1977, the Defendant George McCarty deliverted a quantity of money to Daniel Gramberg at the Veterans Administration Hospital in Sioux Falls."

6. "On or about October 23, 1977, Daniel Gramberg left the Veterans Administration Hospital in Sioux Falls and traveled to Sioux City, Iowa, in the rented Pinto automobile."

In view that the ultimate goal of the alleged conspiracy was to commit murder the Petitioner argues that even if proven, the above alleged overt acts did not constitute overt acts in the furtherance of the conspiracy.

An overt act must be some act by one of the conspirators that occurs subsequent to the agreement, and it must be done in furtherance of the objectives of the conspiracy. Hall v. U.S., 109 F2d 976 (1940). Cross v. U.S., 392 F2d 360 (8th Cir., 1968).

As the New York Court in People v. Wolff, 264 N.Y.S.2d 40, held:

> "Payment of money to a co-conspirator to secure his agreement to the conspiracy is regarded as an act merely cementing the

conspiracy, and not as an overt act committed in furtherance thereof."

The Eighth Circuit Court of Appeals in this case has held contrary to the holding in Wolff and the Petitioner urges that this Court review the question of whether or not such payment of money to secure the agreement of a co-conspirator is an overt act in furtherance of the conspiracy or merely goes to the basis of the agreement.

Likewise, the Petitioner maintains that the alleged overt act number six, even if proven, does not constitute in fact an overt act. If in fact Gramberg left the Veterans Administration Hospital in Sioux Falls and traveled to Sioux City, Iowa, there has been no evidence that would indicate that these acts by Gramberg were in fact in furtherance of the conspiracy. As a matter of fact, the only testimony in this regard by Gramberg was that he was going to go to Phoenix, Arizona, to enter into an agreement with the Defendant.

The Petitioner would direct the Court's attention to the case of Hall v. U.S., 109 F2d 976 (1940) for an excellent definition of an overt act:

> "The overt act must be a subsequent independent act following the conspiracy and done to carry into effect the object thereof, and cannot succeed the completion of the contemplated crime. The overt act must reach far enough toward the accomplishment of the desired result to at least amount to the commencement of the consummation, and if the act of a conspirator be done with the purpose of putting the unlawful agreement into effect, it is sufficient although it has no tendency to accomplish its object."

None of the alleged overt acts, therefore, are in fact overt acts within the meaning of the definition. The evidence failed to show, that even if proven, these alleged acts in any way were in furtherance of an existing conspiracy, and it was error on the part of the Trial Court not to withdraw these alleged overt acts from the jury's consideration.

IV.

The Court of Appeals of the Eighth Circuit in affirming the conviction on the obstruction of justice charge stated that all that must be proven is that the Defendant "endeavored" to obstruct justice. Here the Court of Appeals cited the cases of U.S. v. Russell, 255 U.S. 138, 143 (1921), U.S. v. Mitchell, 514 F2d 758, 760 (6th Cir.) and U.S. v. Missler, 414 F2d 1293, 1306 (4th Cir. 1969), cert. denied, 396 U.S. 1058 (1970) as authority for its holding.

It should be noted that in each of those cases the victim to be murdered or person to be influenced was known to the person who was to carry the crime into fruition. A close reading of the case law relied on by the Court of Appeals' decision in this case shows that where the obstruction of justice charge was affirmed, the courts were presented with facts far more revealing as to the question of endeavoring to obstruct justice.

In the present case, not only did a conspiracy not exist, but there is absolutely nothing in the record to indicate that either of the alleged conspirators

took any step to bring about the death of the alleged prospective victim. By the admission of the Government's own witness, Mr. Gramberg, he did not even know the name of the person who was supposedly to be murdered (TR 105). If the name of the prospective victim is not even known to the conspirator, it is inconceivable that Petitioner could be guilty of obstruction of justice by attempting to bring about the death of an unknown person. Not only did Gramberg not know the name of the intended victim, but there is no evidence that he even knew where he was located.

Petitioner, therefore, respectfully requests this Court to review Petitioner's conviction in light of the long history of case law in this area, which case law seems to conflict with the holding by the Eighth Circuit Court of Appeals.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

L. Anthony Weisensee
108 North Phillips
Sioux Falls, S. D. 57102
Counsel for Petitioner

Steve Jorgensen
Law Center, Suite 100
505 West Ninth Street
Sioux Falls, S. D. 57104
Counsel for Petitioner

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 79-1227

United States of America, Appellee, v. George John McCarty, Jr., Appellant.	*	Appeal from the United States District Court for the District of South Dakota

Submitted: October 12, 1979

Filed: November 30, 1979

Before BRIGHT, ROSS and STEPHENSON, Circuit Judges.

ROSS, Circuit Judge.

George John McCarty, Jr., appeals from his conviction[1] for conspiracy and obstruction of justice in violation of 18 U.S.C. §§ 371 and 1503.[2]

McCarty was charged with conspiracy to corrupt justice by willfully injuring a prospective material witness in a federal trial on charges then pending against McCarty.

[1]The Honorable Andrew W. Bogue, United States District Judge for the District of South Dakota.

[2]McCarty received two concurrent five year sentences to run consecutively with a previous ten year federal sentence for the interstate transportation of stolen property.

Daniel James Gramberg, the key prosecution witness, testified that McCarty approached him with a plan to murder the witness. At the time, McCarty and Gramberg were cellmates incarcerated in the Minnehaha County Jail in Sioux Falls, South Dakota. Gramberg testified that he agreed to commit the murder. In return, McCarty had an attorney visit Gramberg for the purpose of securing his release from the county jail. Pursuing legal alternatives became unnecessary, however, as Gramberg was soon transferred to the Veterans Administration Hospital for medical reasons. While at the hospital, McCarty gave Gramberg $300 to fly to Phoenix to finalize the details of the murder. He then rented a car and left it in the hospital parking lot for Gramberg's use in fleeing the authorities. Gramberg drove from South Dakota to Iowa, but did not fly to Phoenix as planned.

On appeal, McCarty contends: (1) that the government failed to prove the existence of an agreement to conspire; (2) that an alleged overt act was not properly before the jury; and (3) that the evidence was insufficient to sustain his conviction. We affirm.

I. The Agreement to Conspire

McCarty first asserts that the government failed to establish the existence of a conspiracy agreement. We disagree.

A conspiracy "consists of an agreement between the conspirators to commit an offense, attended by an act of one or more of the conspirators to effect the object of the conspiracy." *United States v. Skillman*, 442 F.2d 542, 547 (8th Cir.), *cert. denied*, 404 U.S. 833 (1971). The agreement need not be formal or express. *United States v. Taylor*, 599 F.2d 832, 838 (8th Cir. 1979); *United States v. Pelton*, 578

F.2d 701, 712 (8th Cir.), cert. denied 99 S.Ct. 451 (1978). Rather, a tacit understanding is sufficient to create a conspiracy. *Nilva v. United States*, 212 F.2d 115, 121 (8th Cir. 1954).

McCarty urges that no agreement was reached because the plans were never finalized in Phoenix. However, there is no necessity that the conspiracy be carried to fruition or even to the final stages of planning. Likewise the defendant need not have knowledge of every detail or phase of a conspiracy; knowledge of the essential nature of the conspiracy and the defendant's connection therewith is sufficient to convict. *Blumenthal v. United States*, 332 U.S. 539, 557 (1947).

In the alternative, McCarty contends that Gramberg merely feigned agreement,[3] never intending to harm the witness. *United States v. Moss*, 591 F.2d 428, 434 n.8 (8th Cir. 1979). This contention is belied by the record. On direct examination Gramberg testified as follows:

> Q Then did you and George have any further discussions about killing this witness?
> A Yes. Me and George discussed it. Exactly, me and George were leaning up against the rack and he said, "The only way I could possibly get out of this is to have him murdered--have the witness murdered."
> And I told him that for a few favors, I would do this.
> Q Did you discuss with Mr. McCarty in the jail the manner or method of how this was going to be done?
> A Yes.
> Q Tell us about those conversations as closely as you recall them, and use the exact conversations

[3]There was some testimony on cross-examination to the effect that Gramberg had attempted to abandon the conspiracy. Apparently, the jury chose to credit Gramberg's original account of the conspiracy given on direct examination, as it was entitled to do.

of what was said about that.

A Jim--excuse me--George asked me of what I thought possibly would be the best way to murder the man, and he brought up a rifle. I told him that that would be really messy and it would show that the man was murdered, and the other thing was hitting him over the head and feeding him to the hogs or having some accident of some sort.

Q As far as you were concerned at this point, were these serious discussions?

A Yes, sir.

This testimony, taken in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), clearly establishes the existence of the conspiracy agreement and, if believed, indicates that both parties entered the agreement seriously intending to murder the witness. It was within the right of the jury to believe Gramberg's testimony that a conspiracy to murder the witness had been formed and to disbelieve McCarty's testimony to the contrary.[4]

II. Jury Instructions

Alleged overt act number one as contained in the indictment reads:

> On or about September 1977, Daniel Grambert [sic] and George John McCarty, Jr. met with one another in the Minnehaha County Jail and George McCarty offered his assistance in getting Daniel Grambert [sic] out of jail so that Grambert [sic] could kill John Moeller for George McCarty.[5]

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[4]Indeed, the uncorroborated testimony of an accomplice is sufficient to sustain a conviction if it is not otherwise incredibile or unsubstantial on its face. *United States v. Abrahamson*, 568 F.2d 604, 607 (8th Cir. 1978); *United States v. Knight*, 547 F.2d 75, 76 (8th Cir. 1976). Gramberg's testimony is neither incredible nor unsubstantial. Moreover, it was buttressed by the corroborating testimony of other witnesses who overheard these jailhouse conversations.

[5]Although inarticulately stated, the gist of the overt act alleged was McCarty's assistance in freeing Gramberg from jail.

McCarty submits that the trial court erred in instructing the jury as to this act. He contends that this meeting was either to plan the conspiracy or to agree to it and as such, may not be considered an overt act in furtherance of the conspiracy. This argument fails in light of our conclusion that the government established the agreement element of the conspiracy. It was necessary that Gramberg be released from jail in order to carry out the object of the conspiracy. To that end, McCarty's assistance in securing Gramberg's release was an act in furtherance of the conspiracy which was properly submitted to the jury.

III. Sufficiency of the Evidence

McCarty asserts that the evidence of three alleged overt acts was insufficient to warrant their submission to the jury: (1) Gramberg's placement of a phone call to McCarty's brother, an alleged coconspirator, to facilitate McCarty in contacting Bramberg; (2) the transfer of flight money from McCarty to Gramberg; and (3) Gramberg's sojourn from South Dakota to Iowa in a car rented by McCarty. Specifically, McCarty contends that none of these acts was in furtherance of the alleged conspiracy.

In order to sustain a conspiracy conviction the government need not prove the occurrence of every overt act alleged in the indictment; proof of one overt act in furtherance of the conspiracy will suffice. *United States v. Brown*, 604 F.2d 557, 560 (8th Cir. 1979); *United States v. Parker*, 586 F.2d 1253, 1258 n.2 (8th Cir. 1978). The overt act need not be criminal in nature, so long as it furthers the object of the conspiracy. *United States v. Bass*, 472 F.2d 207, 213 (8th Cir.), *cert. denied*, 412 U.S. 928 (1973).

We have repeatedly stated that "once the government has

established the existence of a conspiracy, even slight evidence connecting a particular defendant to the conspiracy may be substantial and therefore sufficient proof of the defendant's involvement in the scheme." *United States v. Cox*, 580 F.2d 317, 323 (8th Cir. 1978), *cert. denied*, 99 S.Ct. 851 (1979), *quoting United States v. Overshon*, 494 F.2d 894, 896 (8th Cir.), *cert. denied*, 419 U.S. 853 (1974); *United States v. Wyant*, 576 F.2d 1312, 1316 (8th Cir. 1978). Substantial evidence was adduced at trial to establish each of the overt acts alleged. It was proper for the district court to submit those acts for the jury's consideration.

McCarty's final contention is that the evidence was insufficient to sustain his conviction for obstruction of justice. In considering this contention, we must view the evidence in the light most favorable to the verdict rendered. *Glasser v. United States, supra*, 315 U.S. at 80. Accordingly, this court must accept all reasonable inferences which tend to support the jury's verdict. *United States v. Overshon, supra*, 494 F.2d at 896. The statute proscribing an obstruction of justice, 18 U.S.C. § 1503, provides in pertinent part:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, *endeavors* to influence, intimidate, or impede any witness, in any court of the United States * * * in the discharge of his duty * * * or corruptly or by threats or force * * * influences, obstructs, or impedes, or *endeavors* to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(Emphasis added.)

Success is not a prerequisite to conviction for obstruction of justice. *Osborn v. United States*, 385 U.S. 323, 333 (1966). All that must be proved is that the defendant

"endeavored" to obstruct justice. *Id.*; *United States v. Russell*, 255 U.S. 138, 143 (1921). In the instant case, substantial evidence was introduced to establish that McCarty arranged to have a prospective government witness murdered.[6] McCarty not only gave the potential murderer money, *United States v. Mitchell*, 514 F.2d 758, 760 (6th Cir.), *cert. denied*, 423 U.S. 847 (1975), but additionally devised and helped implement his escape from the authorities. On these facts, the jury was justified in concluding that McCarty "endeavored" to obstruct justice.

Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[6] *See, e.g., United States v. Missler*, 414 F.2d 1293, 1306 (4th Cir. 1969), *cert. denied*, 396 U.S. 1058 (1970) (holding that "[t]here can be no question that a person 'endeavors' to obstruct justice when he arranges to have a prospective government witness murdered.").